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In the Supreme Court of the United States

OCTOBER TERM, 1980

EMPRESAS ELECTRONICAS WALSER, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In August 1971, the Small Business Administration ("SBA") denied the corporate petitioner's[1] application for a Certificate of Competency ("COC").[2] Petitioners contend that various SBA officials had previously represented that a COC would be issued and that the denial of a COC therefore constitutes a breach of contract.

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[1]In addition to the corporation, petitioners include two individuals who are officers and the sole stockholders of the corporate petitioner. See Stipulation of Facts, at 2, *United States* v. *Empresas Electronicas Walser, Inc., et al.*, Civ. No. 808-73 (D. P.R., filed July 2, 1975) (hereinafter "Stipulation"). As used herein, "petitioner" refers to the corporate petitioner.

[2]As applicable in 1971, a COC was a written instrument issued by the SBA certifying that the business entity named therein

1. In mid-1970, petitioner was the low bidder on three Department of Defense contracts with, respectively, the Army, the Navy, and the Air Force.[3] On all three bids, the Defense Contract Administration Services Office ("DCASO") recommended against award on several grounds and referred the matter to the SBA for possible COC action (Stipulation, at 2, 3-4, 7-8).

On January 14, 1971, the SBA issued a COC to the contracting officer in charge of the Air Force contract, and on February 16, 1971, a $63,275.00 contract was awarded to petitioner. Petitioner thereafter defaulted on the Air Force contract and was terminated on October 29, 1971. The government's excess reprocurement costs totalled approximately $22,000.00 (Pet. App. 21; Stipulation, at 7-10).

Meanwhile, in October 1970, the solicitation on the Army contract was cancelled and re-bids were requested. Petitioner was still the low bidder, but DCASO again recommended against award. On March 26, 1971, petitioner applied to the SBA for a COC on the Army contract. Although petitioners allege that various SBA officials represented to them that a COC would be issued, the SBA denied petitioner's application in August 1971 (Pet. App. 19; Stipulation, at 4-7).

In September 1970, petitioner sought a $100,000.00 loan from the SBA (Pet. 6). On April 15, 1971, the loan was made in the amount of $76,000 and was guaranteed by the individual petitioners (*id.* at 8-9). When a default

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possessed the capacity and credit to perform a specific government contract. A COC was conclusive on questions of a prospective government contractor's capacity and credit. See 13 C.F.R. 124.8-16 (1971), as amended, 13 C.F.R. 125.5. See also note 4, *infra*.

[3]In October 1970, petitioner withdrew its application for a COC on the Navy contract. See Stipulation, at 3.

occurred on this loan, the United States brought suit against petitioners in the United States District Court for the District of Puerto Rico. Based upon the SBA's denial of a COC for the Army contract, petitioners counterclaimed for breach of contract. After a consent judgment was entered in favor of the United States on its complaint, petitioners' counterclaim was transferred to the Court of Claims (Pet. 10-11; Pet. App. 18-19).

In the Court of Claims, petitioners again asserted their claim for breach of contract and sought damages of approximately $2.5 million for injury to their business and an equal amount for mental anguish allegedly suffered (Restatement of Counterclaim, As Complaint, at 3). The United States counterclaimed for the amounts of its excess reprocurement costs on the Air Force contract, as to which petitioner admitted liability (Pet. App. 21). On the government's motion for summary judgment, the Court of Claims held that there was no contract between petitioners and the SBA, and accordingly it dismissed their claims without prejudice to their right to bring a tort action in some other forum (*ibid.*).

2. Petitioners have presented no reason justifying review by this Court. The decision of the Court of Claims turns only on the particular facts of this case and does not raise any issue of general public importance. Accordingly, further review is unwarranted.

Moreover, the Court of Claims' decision is correct. Petitioners contend that the decision rests upon a mistaken finding concerning disputed facts as to whether they had a contractual commitment for the issuance of the COC. The Court of Claims took the facts as petitioners stated them, however, and correctly concluded that, no matter what representations had been made to petitioners to the effect that an application for a COC would be

granted, the SBA was not contractually bound thereby. The court explained that "an agency does not become bound to favorable action on an application until the previous steps have been taken that its procedure requires" (Pet. App. 20), and that such steps had not been taken with regard to petitioner's application at the time it allegedly was told that it had a "contract."[4] Furthermore, the Court of Claims noted that petitioner "could have expected no other decision" (*id.* at 21) than the denial of its application in view of its impending default on the Air Force contract. At all events, as the court observed, any statements by the SBA Regional Administrator that led petitioner to believe that it had a commitment for a COC "exceeded his authority" (*id.* at 20) and do not estop the government in a breach-of-contract suit. See, *e.g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947).

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[4]In addition, petitioners' claims are based upon the mistaken belief that they would necessarily have been awarded the Army contract if a COC had been issued. The statutory and regulatory scheme in effect in 1971, however, made a COC conclusive only as to a prospective contractor's "capacity and credit" and did not require the contracting officer to award a contract without regard to other aspects of responsibility. See Act of July 18, 1958, Pub. L. No. 85-536, Section 2(8)(b)(7), 72 Stat. 391; 13 C.F.R. 124.8-16 (1971). In contrast, the current scheme makes a COC conclusive "with respect to all elements of responsibility, including but not limited to * * * capacity [and] credit * * *," and directs contracting officers to award a contract for which a COC has been issued. See 15 U.S.C. (Supp. II) 637(b)(7); 13 C.F.R. 125.5. Thus, even if the application for a COC had been granted, it is highly speculative whether petitioner, in view of its record, would have been deemed a responsible bidder and awarded the Army contract. See *United States* v. *Thompson*, 168 F. Supp. 281 (N.D. W.Va. 1958), aff'd, 268 F. 2d 426 (4th Cir. 1959); 37 Comp. Gen. 676 (1958).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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